IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN ITS INSOLVENCY JURISDICTION

NOTICE OF MOTION NO.167 OF 2005
IN
NOTICE NO.N/153 OF 2005

Re: K. Sivarajan & anr. .. Judgment Debtors,
Ex-parte :
M/s. Sree Gokulam Chit &
Finance Co. (P) Ltd. .. Judgment Creditor.

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Mr. K.P. Shreeji for the Judgment Creditor.
Mr. P.G. Pravin for the Judgment Debtors.

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CORAM: DR. D.Y. CHANDRACHUD, J.

5th December, 2006.

P.C. :

1. The Notice of Motion in this proceeding has been taken out to set aside an insolvency notice dated 15th September, 2005. The insolvency notice is based on an award dated 25th June, 2004 passed by the Arbitrator, Central Chennai in Arbitration Case 129 of 2002 for Chit Fund cases. In **Paramjeet Singh Patheja v. I. C. D. S. Limited** (Civil Appeal 4130 of 2006), the Supreme Court has in a decision delivered on 31st October, 2006 held thus :

> "i)that no insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on

the basis of an Arbitration Award;

ii) that execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay under Section 22 of the SICA Act. As such, no insolvency notice is liable to be issued against the appellant.

iii) Insolvency Notice cannot be issued on an Arbitration Award.

iv) An arbitration award is neither a decree nor an Order for payment within the meaning of Section 9(2). The expression “decree” in the Court Fees Act, 1870 is liable to be construed with reference to its definition in the CPC and held that there are essential conditions for a “decree”.

(a) that the adjudication must be given in a suit.

(b) That the suit must start with a plaint and culminate in a decree, and

(c ) That the adjudication must be formal and final and must be given by a civil or revenue court. An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint.

v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration Act, 1996 cannot be construed to be a “decree” for the purpose of Section 9 (2) of the Insolvency Act.

vi) An insolvency notice should be in strict compliance with the requirements in Section 9(3) and the Rules made thereunder.

vii) It is a well established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely any proceedings adopted for realization of a right vested in a party by law. This would clearly include arbitration proceedings.

viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice."

2. The judgment of the Supreme Court holds that an insolvency notice issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 cannot be sustained on the basis of an arbitral award which has been passed under the Arbitration & Conciliation Act, 1996. However, on behalf of the Judgment Creditor it has been submitted that a distinction would have to be made in the present case where the arbitrator was not a private arbitrator appointed by the parties but, was appointed in exercise of powers conferred by the Chit Funds Act, 1982 upon the Registrar.

3. In order to consider the submission a reference to some of the provisions of the Chit Funds Act, 1982 would be in order. The Act was enacted by the Parliament to provide for the regulation of chit funds and for matters connected therewith. A chit fund is defined in Section 2(b) as follows:

> ""Chit" means a transaction whether called chit, chit fund, chitty, kuri or by any other name by or under which a person enters into an agreement with a specified number of persons that every one of them shall subscribe a certain sum of money (or a certain quantity of grain instead) by way of periodical installments over a definite period and that each such subscriber shall, in his turn, as determined by lot or by auction or by tender or in such other manner as may be specified in the chit agreement, be entitled to the prize amount."

4. Section 61 empowers the Central Government to appoint a Registrar of Chits for discharging duties conferred upon him by the Act. Chapter XII of the Act is entitled "Disputes and arbitration". Under sub section (1) of Section 64, notwithstanding anything contained in any other law for the time being in force, any dispute touching the management of the chit business has to be referred by parties to the dispute to arbitration by the Registrar if each party thereto falls within the description contained in clauses (a) and (b). Sub section (3) of Section 64 provides that no civil court shall have

jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub section (1). Section 65 provides for the period of limitation. Clauses (a) and (b) of sub section (1) provide for a certain period of limitation and under sub section (2) it has been specified that in respect of other disputes, the period of limitation shall be regulated by the Limitation Act, 1963 as if the dispute were a suit, and the Registrar, a civil court. By Section 66 the Registrar is required to settle the dispute brought to his notice under Section 64 himself or to refer the dispute for disposal to a person appointed by him. Under sub section (1) of Section 67, the Registrar is conferred with certain powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 in respect of certain matters viz. (i) summoning and enforcing the attendance of persons and examining them on oath; (ii) requiring the discovery and inspection of documents; (iii) receiving evidence on affidavits; (iv) requisition of any public record; (iv) issuing commissions for the examination of witnesses or documents and (vi) any other matter which may be prescribed. The Registrar or his nominee under Section 69 makes an award on the dispute after giving the parties a reasonable opportunity of being heard. An appeal against the decision of the Registrar lies to the State Government under

Section 70. Under Section 71 every order of the Registrar or his nominee or of the State Government in appeal if not carried out, shall on a certificate issued by the Registrar, be deemed to be a decree of a civil court and be executed in accordance with the provisions of law for the time being in force for the recovery of amounts as arrears of land revenue.

In **Paramjeet Singh Patheja**'s case (supra) the Supreme Court has emphasised that an arbitral forum constituted under the Arbitration and Conciliation Act, 1996 cannot be regarded as a civil court nor can an award be held to be a decree within the meaning of Section 2(2) of the Civil Procedure Code 1908. Section 2(2) defines the expression “decree” to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy. In paragraph 13 of the judgment, the Supreme Court held thus :

> “The words 'Court', 'adjudication' and 'suit' conclusively show that only a Court can pass a decree and that too only in suit commenced by a plaint and after adjudication of a dispute by a judgment pronounced by the Court. It is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree.

> Section 2(14) defines 'order' to mean ' “the formal expression of any decision of a civil court which is not a decree;” The words 'decision' and 'Civil Court' unambiguously rule out an award by arbitrators.”

The Supreme Court held that this was the consistent view taken by several High Courts since the earlier years of the 20th century. The Supreme Court relied upon the judgment of Chief Justice Rankin in **Ramshai v. Joylall**[1] amongst other decisions. The Supreme Court held that though an arbitral award is enforceable as if it is a decree of the Court by virtue of the provisions of Section 36 of the Arbitration and Conciliation Act, 1996, that fiction is created for the purposes of execution and must be limited to the purpose for which it was created. The Court held that the words litigant, money decree, judgment debtor, decretal amount and decree holder plainly show that Parliament intended to deal with litigants who do not pay amounts decreed by Civil Courts, while enacting the provisions of the Presidency Towns Insolvency Act, 1909. Proceedings in insolvency being quasi penal in nature, the Supreme Court was of the view that they would have to be construed strictly.

1 AIE 1928 CAL 840.

5. A review of the material provisions of the Chit Funds Act, 1982 would establish beyond doubt that neither the Registrar nor his nominee to whom disputes are referred to arbitration under Chapter XII of the Act constitute a civil court; That certain powers of a civil court are conferred upon the Registrar only goes to emphasise that the legislature did not regard the Registrar as a civil court for all intents and purposes and that in certain matters of procedure such as the summoning of witnesses, discovery or commissions, the powers of the Civil Court have been conferred on him. As in the case of the Arbitration and Conciliation Act where an award is executable as if it were a decree of a Civil Court a fiction has been created under Section 71 of the Chit Funds Act, 1982. The fiction in Section 71 must, however, be limited to the purpose for which it was created in view of the decision of the Supreme Court in **Paramjeet Singh Patheja (supra)**. The fact that an appeal lies against the decision of the Registrar or his nominee to the State Government is one more circumstance which would militate against a construction that the Registrar is a civil court.

6. For all these reasons I am of the view that the judgment of the Supreme Court in **Paramjeet Singh Patheja** (supra) cannot be distinguished and will fully cover an arbitral award passed under the Chit Funds Act, 1982. The Motion shall accordingly be made absolute and is accordingly made absolute in terms of prayer clause (a).